Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

April 2007

No attorney fees where vexatious litigant fails to post a bond. Under the vexatious litigant statute (*Civ.Proc.* §§391-391.7) the court must order a *pro per* plaintiff, who qualifies as a vexatious litigant, to post a bond if the court determines that there is no reasonable probability that plaintiff will prevail. If no bond is posted within 10 days after the court makes such an order, the action must be dismissed.

When the bond is posted and defendant ultimately prevails, defendant is entitled to recover its costs and attorney fees from the bond. But if plaintiff fails to post a bond and the action is therefore dismissed, plaintiff is liable for defendant's costs, but not, for its attorney fees. *Luckett v. Keylee* (Cal. App. Second Dist., Div. 8; February 16, 2007) 147 Cal.App.4th 919, [54 Cal.Rptr.3d 718, 2007 DJDAR 2221].

Judicial Council forms are renumbered. Apparently believing that the havoc created by the renumbering of all California Rules of Court last year was not enough, the Judicial Council has also undertaken the re-numbering of many of its forms. The new form numbers may be found at www.courtinfo.ca.gov/forms/latest.htm.

No immunity for false arrest. Although *Gov.Code* §821.6 immunizes public employees from liability for conduct relating to preparation for formal judicial proceedings, including public statements, even when acting maliciously, the immunity does not extend to false arrest. Where plaintiff was arrested when the police lacked probable cause, plaintiff may recover damages. *Gillan v. City of San Marino* (Cal. App. Second Dist., Div. 3; February 21, 2007) 147 Cal.App.4th 1033, [2007 DJDAR 2369].

State court may award attorney fees to party who obtained dismissal of bankruptcy proceedings. In *Circle Star Center Associates v. Liberate Technologies* (Cal. App. First Dist., Div. 3; February 22, 2007) 147 Cal.App.4th 1203, [2007 DJDAR 2458], defendant, plaintiff's tenant, moved out, stopped paying rent, and filed a petition in bankruptcy. Plaintiff was successful in obtaining a dismissal of the action in the bankruptcy court, persuading the court that the petition was filed in bad faith.

Although the rental agreement contained an attorney fee clause, under bankruptcy law, a party may not recover attorney fees incurred in bankruptcy litigation. But the Court of Appeal held that this prohibition does not extend to state court proceedings initiated to recover such fees and denied the trial court's denial of fees incurred by plaintiff in obtaining the bankruptcy dismissal.

Investigator's misrepresentation of identity may be an invasion of privacy. Reporters, journalists, and researchers may from time to time identify themselves as something other than who they are, in order to obtain better cooperation from a source of information. But such conduct may lead to liability. In *Taus v. Loftus* (Cal.Supr.Ct.; February 26, 2007) 40 Cal.4th 683, [2007 DJDAR 2512], psychiatrists, when interviewing a member of the family of the subject of their study, allegedly falsely identified themselves as having a relationship with a therapist with whom the family had dealt. Our Supreme Court held that such allegations, if proven, could be the basis for liability under an invasion of privacy theory (intrusion-into-private-matters).

Statute of Frauds does not preclude admission of extrinsic evidence. The statute of frauds

Participate In The Discussion Board Excitement

See what all the excitement is about! We are having great participation on our State Bar Litigation Section Bulletin Board. Join in on the exciting discussions and post your own issues for discussion.

If you have any comments, ideas, or criticisms about any of the new cases in this month's issue of Litigation Update, please share them with other members on our website's discussion board.

Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with. Go to: http://members.calbar.ca.gov/discuss to explore the new bulletin board feature—just another benefit of Litigation Section membership.

Remember to first fill out the Member Profile to get to the Discussion Board!

Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, click here.

(*Civ.Code* §1624) provides that certain contracts "are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged." But this does not prohibit the consideration of extrinsic evidence to explain or clarify the contents of the writing, so long as such extrinsic evidence does not contradict the terms of the writing. "The memorandum, viewed in the light of the evidence, must be sufficient to demonstrate with reasonable certainty the terms to which the parties agreed to be bound." But where the price term of the contract was uncertain, the purported contract could not be enforced. *Sterling v. Taylor* (Cal.Supr.Ct.; March 1, 2007) 40 Cal.4th 757, [2007 DJDAR 2798].

Court may weigh evidence in considering the reasonable probability in the success of an action by a vexatious litigant. In ruling on summary judgment and anti-SLAPP motions, the court may not weigh conflicting evidence and must accept the evidence presented by the party opposing the motion at face value. Not so when ruling on a motion to order a vexatious litigant to post security (see, *Civ.Proc.* §391.3). In ruling on such a motion, the court may weigh the conflicting evidence. *Moran v. Murtaugh Miller Meyer & Nelson, LLP.* (Cal.Supr.Ct.; March 1, 2007) 40 Cal.4th 780, [2007 DJDAR 2795].

Plaintiff may dismiss voluntarily without prejudice before OSC hearing. Where plaintiff dismissed the action without prejudice just before a hearing on an OSC in re: dismissal for failure to attend a mandatory settlement conference and other failures to appear, the court ordered that the dismissal was to be with prejudice. Wrong! The Court of Appeal held that the plaintiff had an unqualified right to a dismissal without prejudice under *Code Civ. Proc.* §581(b)(1) which provides that plaintiff may dismiss without prejudice "at any time before the actual commencement of the trial." *Franklin Capital Corporation v. Wilson* (Cal. App. Fourth Dist., Div. 3; February 28, 2007) 148 Cal.App.4th 187, [2007 DJDAR 2885].

CAUTION: Many cases have defined the "actual commencement of the trial" very broadly to include other "dispositive" actions by the court or by a party. (*See*, Weil & Brown, *Civil Procedure Before Trial*, The Rutter Group, ¶¶ 11:17 ff.)

Failure to obtain visa extension for employee may constitute wrongful termination. In *Incalza v. Fendi North America, Inc.* (9thCir.; March 6, 2007) (Case No. 04-57119) [2007 DJDAR 3092], in an opinion by Judge Reinhardt, the Ninth Circuit held that, where an employer could have, but did not obtain a visa extension for an alien employee, the employer could be liable for wrongful termination. The court reasoned that state law pertaining to employees' rights was not preempted by federal immigration law.

Class Action Fairness Act applies only to actions filed after February 18, 2005. The *Class Action Fairness Act* (28 USC §1332(d)) permits a defendant to remove major class actions to federal court. (For further details, *see*, Weil & Brown, *Civil Procedure Before Trial*, The Rutter Group, ¶¶ 14:7.15 ff.) But where plaintiff's action was commenced before the February 18, 2005 effective date of the act, it was not removable to federal court, even though the class action allegations were added by an amended pleading filed after that date. *Progressive West Insurance Co. v. Preciado* (9th Cir.; March 6, 2007) (Case No. 06-17367) [2007 DJDAR 3096].

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